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IN THE

# Supreme Court of the United States

OCTOBER TERM 1913

No. 180

GEORGIA HARDWOOD LUMBER COMPANY,

*Petitioner*,
*(Respondent-Appellee below)*,

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,

*Respondent*.
*(Libellant-Appellant below)*.

## PETITION OF GEORGIA HARDWOOD LUMBER COMPANY FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT OF PETITION

JOHN TILNEY CARPENTER,
*Counsel for Petitioner*,
25 Broad Street,
New York City.

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COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
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*(Libellant-Appellant below)*.

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## PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Georgia Hardwood Lumber Company, respectfully shows to this Honorable Court as follows:

### A. Summary Statement of the Matter Involved

#### 1. The Proceedings in the Lower Courts

This petition for a writ of certiorari by the respondent in an action in admiralty is sought to review a final judg-

ment of the Circuit Court of Appeals for the Fifth Circuit which denied petitioner's motion to dismiss an appeal of respondent herein (libellant-appellant below) from a final decree of the United States District Court for the Southern District of Georgia, Augusta Division, reversed said decree and remanded the cause to the District Court for further proceedings (R. 122).

The action, brought by respondent herein, owner of the Panamanian SS. *Kotor*, arose from a written contract made in November, 1940 for shipment of petitioner's cargo from Jacksonville, Florida, to Alexandria, Egypt. Under the contract petitioner, a Georgia corporation, agreed to ship 750,000 board feet of pine timbers "not exceeding 4 pounds per board foot" at an ocean freight rate of $70 per 1,000 board feet (R. 24, 39, 101-102). Petitioner concededly shipped the entire quantity and paid the full ocean freight at the measurement rate (R. 26, 97). Respondent carrier, however, claiming that the timbers exceeded 4 pounds per board foot in weight, brought this action in personam in admiralty to recover an additional sum of $9,304 for "lost freights on a corresponding amount of tonnage" (R. 3).

The action was tried June 28, 1942 before Hon. Archibald B. Lovett, United States District Judge (R. 1, 39), who filed an opinion on December 5, 1942 (R. 19-23) and findings of fact and conclusions of law on April 20, 1943 (R. 24-27), holding that respondent herein (libellant below) failed to sustain its burden of proving that petitioner's shipment in fact exceeded 4 pounds per board foot when loaded on the ship at Jacksonville, and dismissing the libel on the merits (R. 23, 27).

The District Court's opinion is reported in 48 F. Supp. 402.

The final decree of the District Court dismissing the libel was entered April 20, 1943, from which date respondent herein had three months in which to appeal to the Circuit Court of Appeals for the Fifth Circuit, under the

provisions of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; U. S. Code, Ti. 28, §230, which provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

On July 12, 1943 respondent filed in the office of the Clerk of the District Court a notice of appeal, served on petitioner's counsel July 6 (R. 2, 30). On July 12 respondent's counsel also consulted with District Judge Lovett concerning the amount for which an appeal bond for costs should be furnished, which Judge Lovett fixed at $250. Respondent made no request for an allowance of appeal or other action by the Court during the three months' period which expired July 20, 1943 (R. 112, 113, 118). The appeal bond, executed July 16, 1943 (R. 38) was not filed until July 21, at which time respondent also filed assignment of errors (R. 2, 33, 37, 118).

On August 12, 1943 respondent's counsel filed a petition for allowance of appeal executed August 6, 1943, which Judge Lovett allowed on August 13, 1943 (R. 31-33, 118). On August 30, 1943, Judge Lovett signed an order allowing the appeal nunc pro tunc as of July 12, 1943, in which he recited that the record contained no allowance of appeal prior to the order of allowance based on the petition therefor filed August 12, 1943, which, however, was subsequent to the expiration of the "ninety day period" (sic) following the date of the final decree; that the Judge, during the "said ninety day period" learned of appellant's intention to appeal and "undoubtedly would have allowed the appeal if and when so requested" (R. 112, 113).

Petitioner herein moved the Circuit Court of Appeals for the Fifth Circuit to dismiss the appeal on the ground that application therefor was not duly made within three months after the entry of the decree appealed from, as required by the statute and, among other authorities, by

the decision of this Court in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174.

On March 1, 1944 the Circuit Court of Appeals for the Fifth Circuit heard argument on the motion to dismiss the appeal and on the merits. On April 5, 1944 it rendered an opinion (R. 115-121) denying the motion to dismiss the appeal and reversing the decree of the District Court on the merits with instructions to remand for further and not inconsistent proceedings (R. 121).

The opinion of the Circuit Court of Appeals is reported in 141 F. (2d) 652.

## 2. The Facts

The substantially uncontradicted facts are as follows:

The contract of shipment dated November 13, 1940, as corrected for a typographical error by stipulation of counsel at the trial (R. 24, 39), provided as follows:

> "Engaged for account of Georgia Hardwood Lumber Company with Compania de Navegacion Transmar, S.S. *Panama* for shipment from Jacksonville to Alexandria, Egypt by steamer Pan. S.S. *Kotor* scheduled to load 11/25/40 750,000 Bd. Ft. Pine Timbers Not Exceeding 4 Pounds per Bd. Ft. at $70.00 per 1000 Bd. Ft. On And/Or Under Deck, Ship's Option" (R. 19, 101, 102).

The *Kotor* arrived at Jacksonville November 26, 1940, began loading cargo the next day and completed loading all of petitioner's and other cargo on December 4, 1940. Substantially all of petitioner's shipment of timbers was awaiting the ship's arrival at Jacksonville, to which point they had been transported by railroad from interior points of origin on open flat cars, exposed to sun and circulation of air. The shipment consisted chiefly of "water-seasoned" sawn pine timbers, 38 carloads coming from Century, Florida, and 3 from Brewton, Alabama, where they were loaded directly from water storage onto the flat cars, thence moved to Pensacola, where they were

weighed by the railroads for the purpose of assessing railroad charges. One carload from Gulf Hammock was similarly weighed at Dunnellon, Florida. The railroad weights, taken while the timbers were still wet from their long immersion in water, showed an average of about 4.75 pounds per board foot. After such weighing, the timbers, stowed on the open flat cars and abundantly ventilated by separation strips and butts spaced apart, were moved to Jacksonville, a distance of about 400 miles from Pensacola and 100 miles from Dunnellon.* A maximum period of at least 16 days and an average of at least 10 days elapsed between the time the first car was weighed until the last car was loaded on the *Kotor* at Jacksonville (R. 19, 24, 117).**

The railroad way bills coming to the attention of the ship's agent at Jacksonville several days before the *Kotor* arrived, he complained to petitioner's representative that they showed the timbers to exceed the weight of 4 pounds per board foot specified in the contract. Petitioner's representative reminded him of a previous conference in which he had been informed that the timbers had been water-seasoned and would dry out and lose weight in transit to Jacksonville, so that they would not exceed 4 pounds per foot when loaded on the vessel (R. 95). The ship's agent suggested that "sample" cars be weighed, which petitioner's representative declined because of the impos-

* The District Court, on uncontradicted evidence (R. 61), found that the railroad transit from Pensacola to Jacksonville was approximately 400 miles (R. 24). The Circuit Court of Appeals, apparently deducting the distance from Century and Brewton to Pensacola, erroneously stated that the distance from Pensacola to Jacksonville was 340 miles (R. 116), thereby substantially diminishing the length of railroad transit during which the timbers were subjected to ventilation, dehydration and loss of weight.

** There is no evidence to support the Circuit Court of Appeals' statement that "all of them (railroad cars) were discharged by Dec. 1st" (R. 116). The uncontradicted evidence was that direct loading from the cars onto the *Kotor* was completed December 4 (R. 97). The erroneous date assumed by the Circuit Court of Appeals diminished the period of evaporation and loss of weight by three days.

sibility of picking representative samples, but suggested that all the cars be weighed. The ship's agent declined to do this and failed to have any of the timbers weighed at Jacksonville, although, as found by the District Judge (R. 22, 25), this would have been a simple matter involving trifling expense and no delay (R. 96). The entire shipment of 750,000 board feet plus an additional quantity shipped by petitioner under a second booking (which petitioner declined to guarantee would weigh less than 5 pounds per board foot because it was "green", not water-stored) (R. 88, 93, 100), was thereafter loaded direct from the railroad cars onto the *Kotor* (R. 24, 97). The vessel also loaded timber of another shipper (R. 97). Petitioner paid the full ocean freight at $70 per 1,000 board feet in accordance with the contract (R. 20-21, 26, 97). Respondent carrier then brought this action against petitioner, the shipper, for "lost freights on a corresponding amount of tonnage" claimed by reason of the alleged excess weight of petitioner's shipment (R. 3).

At the trial before District Judge Lovett, respondent relied solely upon the railroad weights taken while the timbers were still soaked with water, near the interior points of origin, as sufficient proof that petitioner's shipment exceeded the stipulated weight of 4 pounds per board foot when loaded on the vessel. It failed to offer any proof whatever that the asserted overweight caused it to be deprived of any other cargo or to sustain any damages whatever.

The uncontradicted testimony was to the effect that the weight of pine timber is largely affected by the weight of sap or of moisture content. Upon long immersion of green timber the water penetrates the wood and dissolves and replaces the sap with little if any increase in weight (R. 55, 76, 79, 84). When the timber is taken from the water the water evaporates and the timber loses weight rapidly —much faster than does green timber (R. 55, 59, 76, 85). The process of evaporation and loss of weight is acceler-

ated by ventilation and the circulation of air (R. 52, 83, 118). Experts testified without contradiction that water-seasoned timbers, under the conditions of open stowage on railroad flat cars, ventilation and long transit, as occurred here, would lose considerable moisture and weight prior to loading on the vessel at Jacksonville. Although their estimates of the probable loss of weight varied because the precise conditions at all times during the transit were not known, they agreed that the timber lost substantial weight after weighing on the railroad scales at Pensacola, so that they probably did not weigh more than 4 pounds per foot when loaded on the *Kotor* (R. 60, 65, 78, 83).

### 3. The Decision of the District Court

The District Court held that the burden of proof rested upon libellant (respondent herein) to establish that the weight of the shipment exceeded the maximum stipulated in the contract at the time of loading on the vessel. It further held that libellant failed to sustain its burden of proof by the evidence of the railroad weights taken shortly after the timbers were removed from water-storage, because those weights did not remain constant, inasmuch as the timbers were thereafter subjected to conditions which tended to cause substantial evaporation and loss of weight; furthermore, that it failed to establish the actual weight at shipside by having the shipment weighed on the track scales at Jacksonville, which would have been a simple matter involving slight expense and no delay. Accordingly the District Court found it unnecessary to consider the defense that libellant failed to make any showing of damages whatever, and dismissed the libel on the merits (R. 21-24, 26-27).

### 4. The Appeal Proceedings Below

From the final decree entered April 20, 1943 (R. 2, 28) respondent herein took a purported appeal to the Circuit

Court of Appeals for the Fifth Circuit, in connection with which the following occurred:

1943

Apr. 20 Final decree dismissing libel entered (R. 2, 28, 118).

July 6 Notice of appeal served on petitioner's proctors (R. 118).

July 12 Notice of appeal filed with Clerk of District Court. No application for allowance of appeal or order allowing appeal (R. 2, 20).

July 12 Proctors for respondent consulted the District Judge on the amount of an appeal bond, fixed at $250 (R. 118).

July 16 Appeal bond executed (R. 38, 118).

July 20 Period for allowance of appeal expired (three months from April 20).

July 21 Appeal bond and assignment of errors filed with Clerk of District Court (R. 2, 33, 37, 118).

Aug. 6 Petition for allowance of appeal verified (R. 33, 118).

Aug. 12 Petition for allowance of appeal filed (R. 112, 118).

Aug. 13 Appeal allowed (R. 32, 118).

Aug. 14 Praecipe filed (R. 2).

Aug. 17 Citation dated August 16 issued (R. 2).

Aug. 30 Order of the District Judge signed and filed, allowing appeal nunc pro tunc as of July 12 (R. 112, 113, 118).

### 5. The Decision of the Circuit Court of Appeals

The Circuit Court of Appeals, denying petitioner's motion to dismiss the appeal made on the ground that respondent failed to make due application for allowance of the appeal within three months from the entry of the final decree, also reversed the District Court on the merits, and remanded the cause for further and not inconsistent proceedings (R. 121, 122).

In connection with the procedural question the Circuit Court of Appeals held:

(a) "The point as to our jurisdiction is quite a serious one." As the Federal Rules of Civil Procedure, by the express terms of Rule 81(a)(1) do not apply in admiralty, appellate jurisdiction in admiralty depends upon "substantial reliance" on 28 U. S. C. A., §230 (R. 119).

(b) Appellant (respondent herein) "did not within the ninety days" (sic) from the entry of the decree "formally apply for and obtain the allowance of an appeal" (R. 118). Nevertheless, if informal application is timely made, actual allowance may come later (R. 120).

(c) Notwithstanding the decision of this Court in *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174 (which held that the right of appeal in admiralty is conditioned upon compliance with the requirements of U. S. Code, Ti. 28, §230, supra, and that even a rule of the Circuit Court of Appeals requiring only the filing of a notice of appeal cannot contravene the statute), nevertheless appellant's acts in merely filing a notice of appeal and consulting with the District Court concerning the amount of a prospective bond for costs, subsequently executed, amounted to a "timely application to appeal" which was perfected by actual allowance after the period had expired (R. 121).

(d) Indicating considerable doubt and hesitancy that its decision squared with this Court's opinion in *Alaska Packers Association* v. *Pillsbury*, which, it admitted, was "disturbing" the Circuit Court of Appeals, said:

> "It is quite plain that it (appellant) was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the Alaska case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a

timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established" (R. 121).

(c) Notwithstanding that appellant failed to request any action by the Court for allowance of appeal, approval of an appeal bond, or otherwise, during the statutory period, nevertheless *R. F. C.* v. *Prudence Group*, 311 U. S. 579, and other cases "warrant our taking jurisdiction and denying the motion to dismiss" because otherwise would be "to deprive a litigant of his right to appeal merely because, though it plainly appeared that he was intending to and thought he was doing what was necessary to, appeal, he took his steps informally instead of formally" (R. 120, 121).

On the merits the Circuit Court of Appeals held: "The evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment" (R. 121) notwithstanding that the railroad weights were ascertained by the railroads near interior points of origin before the timbers dried out and lost weight in transit to Jacksonville, and the uncontradicted evidence showed that a substantial loss of weight occurred prior to loading on the vessel.

Conceding that the opinion testimony that the timbers would dry and had to some extent dried "should not be wholly rejected" nevertheless the earlier rail weights established a factual condition which continued unless the evidence thereof was "entirely overthrown", thus in effect shifting to petitioner the burden of proving the ultimate fact of the weight of the shipment when loaded on the vessel (R. 121).

As the Court devoted a scant half page, without citation of authority, to support its reasons for reversing the District Court's careful opinion, findings of fact and conclusions of law on the merits, it is impossible to ascertain the grounds for its decision without reference to its statement of the case and review of the facts, viz.:

(a) Reciting that the suit was "for freight money * * * at $35 per ton" (R. 115, 116), the Court evidently considered that a contract for ocean shipment of a quantity of cargo on a measurement basis at a measurement rate, with a collateral undertaking as to weight, constitutes a contract to ship and pay freight on a weight basis.

(b) Stating that the "positive rail weights (were) obtained and furnished by the respondent" (petitioner) (R. 121) and that "when * * * the timbers were loaded aboard the ship the (railroad) bills of lading were delivered to libellant" (R. 117), the Court, inventing a fact not found in the record, apparently considered that petitioner offered to the carrier the railroad bills of lading and their recital of previously existing weights as a representation of the weights of the timbers at shipside.*

## B. The Basis of the Jurisdiction of This Court

The statutory provision believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., §347(a).

## C. The Questions Presented

1. May an appeal from a final decree in admiralty be taken without making an application for allowance thereof within three months from the entry of the decree appealed from?

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*The sales invoices (Ex. P-6) and railroad freight bills (Ex. P-2) show that the timbers were shipped by the suppliers at Century, Brewton, etc., to petitioner in care of respondent's agent at Jacksonville for export, whereby he acquired knowledge of the railroad weights at interior points. Before the ship arrived petitioner's representative informed him that these rail weights would not accurately reflect the weights on completion of the rail transit (R. 95).

If so, the requirements prescribed by Congress in 28 U. S. C., §230, are inapplicable to appeals in admiralty, and the decisions of this Court in *Alaska Packers Association* v. *Pillsbury*, supra, and *Barrel* v. *Transportation Co.*, 3 Wall. 424, are overruled.

2. Does the mere filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, constitute a "duly made" application for "allowance" of an appeal in admiralty?

If so, litigants, and not Congress, control the procedure for taking appeals in admiralty; and the decisions of this Court in *Alaska Packers Association* v. *Pillsbury* and *McCrone* v. *United States*, 307 U. S. 61, and the decisions of the Circuit Courts of Appeal of many Circuits construing the statute, no longer apply.

3. Under a contract to ship cargo on a measurement basis, both as to quantity and rate of ocean freight, which is completely performed, can the carrier recover extra compensation based on an undertaking as to the weight of the cargo without proving (a) the weight when loaded on the vessel and (b) the damages sustained thereby?

If so, then shipments on the basis of measurement become shipments on the basis of weight at the option of the carrier, and the law of contract warranties is thrown into confusion.

4. Where a factual condition is sought to be proved by circumstantial evidence based upon an inference of the continuous condition of a previous state, does the burden shift to the opponent, not merely of going forward with evidence to show a substantial change in the previous condition, but also to prove the quantum of such change?

If so, then the proponent of an ultimate fact discharges his burden of proof by resort to speculative and illogical inferences, and the burden of proving the ultimate fact shifts to the opponent, contrary to established principles of law.

## D. The Reasons Relied On for the Allowance of the Writ

It is respectfully submitted that this Court should take up this case on certiorari, set aside the decision of the Circuit Court of Appeals, and restore the decision and decree of the District Court on the following grounds:

1. This case involves an important procedural question involving appeals in admiralty which may be taken only upon compliance with the requirements prescribed by Congress in U. S. Code, Ti. 28, §230.

The courts have heretofore consistently held that the statute is "mandatory and jurisdictional", and that an application for allowance of an appeal must be duly made within three months from the entry of the decree.* In holding that an appeal in admiralty is validly taken without any request to the Court for an allowance of appeal within three months from the entry of the decree appealed from, the Circuit Court of Appeals has nullified the statute and has decided an important question of procedure which is in direct conflict with *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, and *Barrel* v. *Transportation Co.*, 3 Wall. 424; also with *McCrone* v. *United States*, 307 U. S. 61.

It is also in direct conflict with the decisions of the Circuit Courts of Appeals in the following cases, among others: *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750; *Camden Iron Works Co.* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846; *United States* v. *New National Coal & Mining Co.*,

* Federal Rules of Civil Procedure, permitting an appeal by filing a notice of appeal, do not apply to proceedings in admiralty. Rule 81(a)(1).

C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8th, 50 F. (2d) 669; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

2. The Circuit Court of Appeals has wrongly decided an important question of mercantile law in such a way as to misconstrue and distort a clearly expressed contract for shipment on a measurement basis into a shipment on a weight basis at the carrier's option; and has ignored the legal effect of a collateral undertaking of weight as being at most a warranty, requiring the carrier to prove both breach and damages therefrom, contrary to established principles of law and the authorities, including *Excelsior Coal Co.* v. *Gildersleeve*, C. C. A. 2, 160 Fed. 47.

3. The Circuit Court of Appeals has wrongly decided an important question of the laws of evidence, presumptions and the burden of proof, contrary to well-recognized principles, and particularly to those stated by this Court in *N. Y. Life Ins. Co.* v. *Gamer*, 303 U. S. 161, and *Del Vecchio* v. *Bowers*, 296 U. S. 280, 286, and to the decisions of the courts of many States including *Cage* v. *Amsler* (Court of Civil Appeals, Texas), 217 S. W. 1094, *McLaughlin* v. *Terrell Bros.* (Court of Civil Appeals, Texas), 179 S. W. 932; *Jensen* v. *Logan City*, Utah, 57 Pac. (2d) 708; *Cleveland C. C. & St. L. Ry. Co.* v. *Starks*, Indiana, 106 N. E. 646, and *Bludworth* v. *Bray*, 59 Fla. 437, 52 So. 957.

4. All the questions herein presented are of great importance to courts of admiralty and practitioners of admiralty law, and to shippers, carriers and all others concerned in commerce. The decision of the Circuit Court of Appeals on all of these questions appears to be in conflict with an Act of Congress as construed by this Court, the weight of authority and established principles of admiralty procedure and of contract law.

## E. Accompanying Documents

A certified copy of the transcript of the record of the proceedings of the District Court and Circuit Court of Appeals is presented herewith, together with copy of order of the Circuit Court of Appeals dated May 21, 1944, granting a further stay of its mandate for thirty days.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court on a day to be designated for its review and determination, a full and complete transcript of all proceedings in said Circuit Court of Appeals in the case entitled in that Court: Compania de Navegacion Transmar S.A., owner of S.S. *Kotor,* libellant-appellant, against Georgia Hardwood Lumber Company, respondent-appellee, No. 10796; that the appeal taken to said Circuit Court of Appeals be dismissed; that the decision of the said Circuit Court of Appeals rendered on the 5th day of April, 1944, be reversed and the decree of the District Court be reinstated by this Honorable Court; and that your petitioner may have such other and further relief in the premises as may be just.

And your petitioner will ever pray, etc.

Dated, New York, June 16, 1944.

GEORGIA HARDWOOD LUMBER COMPANY
Petitioner.

By JOHN TILNEY CARPENTER,
*Counsel for Petitioner.*

IN THE

# Supreme Court of the United States

OCTOBER TERM 1943

No.

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GEORGIA HARDWOOD LUMBER COMPANY,
*Petitioner*
*(Respondent-Appellee below),*

against

COMPANIA DE NAVEGACION TRANSMAR, S.A.,
Owner of SS. KOTOR,
*Respondent*
*(Libellant-Appellant below).*

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## BRIEF FOR PETITIONER

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### The Opinions Below

The opinion of the District Court is officially reported in 48 F. Supp. 402. The opinion, findings of fact and conclusions of law are printed in the Record (R. 19-27). The opinion of the Circuit Court of Appeals, filed April 5, 1944, is officially reported in 141 F. (2d) 652, and printed at pages 115-121 of the Record.

### The Jurisdiction of This Court

This is a suit in admiralty by respondent against petitioner for the recovery of $9,304 alleged "lost freights" claimed to have been sustained by respondent carrier as the

result of alleged excess weight of a cargo under a contract for shipment of 750,000 board feet of pine timbers "not exceeding 4 pounds per board foot at $70.00 per 1000 board foot on and/or under deck ship's option" from Jacksonville, Florida, to Alexandria, Egypt.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. Code, Ti. 28, §347(a).

## The Facts

The facts are stated in the petition and will not be repeated here.

## POINT I

**The Circuit Court of Appeals has wrongly decided an important question of statutory procedure in respect of appeals in admiralty, in conflict with the terms of the statute and with decisions of this Court and of other Circuit Courts of Appeal.**

Prior to 1938 all appeals in actions at law and in admiralty were governed by Section 8(c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940; 28 U. S. C. §230,* which provides:

* By the Act of June 19, 1934, c. 651, Sec. 1, 48 Stat. 1064, 28 U. S. C. 723b, the Supreme Court was granted the power to prescribe general rules for the practice and procedure in civil actions at law. Rule 81(a)(1) of the Federal Rules of Civil Procedure expressly provides that those Rules do not apply to proceedings in admiralty. This Court has not altered the Admiralty Rules so as to permit an appeal to be taken to the Circuit Court of Appeals by merely filing a notice of appeal as permitted by the Rules of Civil Procedure, and the requirements for taking an appeal in admiralty continue to be governed by 28 U. S. C. §230. *The Fanny D.*, C. C. A. 5, 112 F. (2d) 347; *Blaske* v. *Dick*, C. C. A. 7, 126 F. (2d) 96. It is equally clear that the decisions of the courts construing 28 U. S. C. §230 before the promulgation of the Federal Rules of Civil Procedure remain applicable to the construction of that statute in respect of appeals in admiralty.

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

In holding that respondent's acts in merely filing a notice of appeal and conferring with the District Judge concerning the amount of a prospective appeal bond, without request for any action by the District Judge within the three months' period, "amounted to a timely application to appeal" herein (R. 121), the Circuit Court of Appeals has in effect nullified the statutory requirement that an *application for allowance* of an appeal in admiralty must be *duly made* within the three months' period.

The courts have repeatedly held that the requirements of the statute are "mandatory and jurisdictional", as the Circuit Court of Appeals itself has held; and cannot be avoided by consent, waiver, or even by order of the court: *Robertson* v. *Morganton Full Fashioned Hosiery Co.*, C. C. A. 4, 95 F. (2d) 780; *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712; *Morrow* v. *Wood*, C. C. A. 5, 126 F. (2d) 1021; *Vaughan* v. *American Insurance Co.*, C. C. A. 5, 15 F. (2d) 526; *Ross* v. *White*, C. C. A. 6, 32 F. (2d) 750; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871; *Collins* v. *United States*, C. C. A. 8, 24 F. (2d) 823.

In *Alaska Packers Association* v. *Pillsbury*, 301 U. S. 174, this Court unequivocally stated that an appeal in admiralty may not be validly taken by filing a notice of appeal unless accompanied by due application to the District Court for an allowance of the appeal, and that even a rule of the Circuit Court of Appeals cannot dispense with the statutory requirement of due application and allowance, saying:

> "The reasons for requiring that an appeal be duly applied for and allowed are that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be reexamined on appeal; and that appropriate security for costs may be taken where the appellant is not by law ex-

empted from giving such security. In this way improvident and unauthorized appeals are prevented. While an appeal in a proper case is matter of right the question whether the case is a proper one under the law regulating appeals is not left to the appellant, but is to be examined and primarily determined by the court or judge to whom the application is to be made. The reasons for thus conditioning the right of appeal have the same application to decrees in admiralty that they have to decrees in equity and judgments at law; and the act of 1925 includes one as much as another, for it says: 'No * * * appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made'" (p. 177).

It is perfectly clear that no application for an allowance of its appeal was made by respondent herein before the three months' period expired on July 20, 1943 (which the Circuit Court of Appeals described as "the ninety days", R. 119, 120), and, indeed, that neither respondent's counsel nor the District Judge thought either application or allowance was necessary. The recital in the District Court's nunc pro tunc order of August 30, 1943, that he would "undoubtedly have allowed the appeal *if and when so requested*" (R. 113) shows that no such request was made prior to the actual petition for allowance of appeal executed August 6, 1943, and allowed August 13, 1943 (R. 31, 33), long after the statutory period had expired. Concededly, the belated application and allowance, and the District Court's nunc pro tunc order of August 30, 1943 (R. 112, 113) were of no avail if the acts performed during the three months' period did not comply with the statutory requirements (R. 120); *Old Nick Williams Co.* v. *United States*, 215 U. S. 541; *Credit Co.* v. *Arkansas Central Railway*, 128 U. S. 258.

The Circuit Court of Appeals, however, saying that "the language of the opinion in the *Alaska* case, which, though not directly in point, is disturbing" (R. 120-121), held that the mere filing of a notice of appeal and discussion with the District Judge concerning the amount of an appeal bond

to be later obtained "amounted to a timely application to appeal", because respondent and the District Judge "thought it was effectively appealing" (R. 120). But the same could be said even more strongly in favor of the appellant's improper procedure in *Alaska Packers Association* v. *Pillsbury*, supra, where he complied with the rule of the Circuit Court of Appeals, and neither he nor that court thought that his right to appeal was, as this Court subsequently held, *conditioned* upon due application and allowance.

The decision of the Circuit Court of Appeals is directly contra to that of this Court in *McCrone* v. *United States*, 307 U. S. 61, holding that in filing a notice of appeal and obtaining the trial judge's signature to a bill of exceptions, the appellant failed to comply with the statutory requirement of application for allowance of his appeal. There, too, the appellant "thought" he was "effectively appealing".

The error into which the Circuit Court of Appeals fell was to extend a tolerance of informal procedure so as to dispense entirely with performance of an essential act which Congress has prescribed. *Cf. McCrone* v. *United States*, C. C. A. 9, 100 F. (2d) 322, 324, aff'd 307 U. S. 61. The exercise of the right to appeal is conditioned upon submission of the appeal to the Court for its action allowing the same, both by the express terms of the statute and by the authorities which have construed it. *Barrel* v. *Transportation Co.*, supra; *Alaska Packers Association* v. *Pillsbury*, supra; *McCrone* v. *United States*, supra; *Camden Iron Works* v. *City of Cincinnati*, C. C. A. 6, 241 Fed. 846; *United States* v. *New National Coal & Mining Co.*, C. C. A. 7, 72 F. (2d) 168; *Share* v. *United States*, C. C. A. 8, 50 F. (2d) 669; *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61.

In *United States* v. *New National Coal & Mining Co.*, supra, the Circuit Court of Appeals for the Seventh Circuit said:

> "Appeal is granted to the losing party on condition that he complies with the terms of the law whereby it is

> authorized. * * * Merely declaring that he will appeal does not of itself amount to taking an appeal nor does the mere filing of a petition for appeal have that effect. The filing of the petition for appeal avails nothing unless within the statutory time allowed for taking the appeal it is brought to the attention of the judge for action thereon" (p. 168).

In *Share* v. *United States*, supra, counsel for appellant, within three months, served and filed a notice of appeal and, in conference with the District Judge, presented him an application for an allowance of the appeal but did not leave the papers with the Judge. In dismissing the appeal, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is clear that for some reason the petition for appeal, accompanied by the assignment of errors, was not finally submitted to the trial judge for action at that time; nor is there any suggestion that counsel seeking the appeal, at the time of the Duluth interview, had done all that he was required to do in order to have the appeal allowed, and that the delay was due solely to inaction by the court" (p. 670).

In *Camden Iron Works* v. *City of Cincinnati*, supra, counsel, within the statutory time, withdrew his appeal papers from the Clerk's office and brought them to the attention of the District Judge in connection with efforts to settle the bill of exceptions. Dismissing the appeal, the Circuit Court of Appeals for the Sixth Circuit said:

> "But we are not satisfied that application was then and there made for an immediate or present allowance of writ of error * * * (p. 849).
>
> "We thus think that plaintiff in error has failed to show with requisite clearness that it did all within its power to procure the issuing of the writ within the statutory period" (p. 850).

The "application" for allowance required by the statute necessarily carries the element of request. *Osborn* v. *United States*, C. C. A. 4, 50 F. (2d) 712, 714; *Robie* v. *Hart, Schaffner & Marx*, C. C. A. 8, 40 F. (2d) 871, 872.

No request for allowance of appeal was made here. The District Judge was merely asked the amount for which an appeal bond should be later provided, and which was in fact not executed until several days later or filed until July 21, 1943, after the three months' period had expired (R. 37, 38).

In relying upon *R. F. C.* v. *Prudence Group*, 311 U. S. 579, as warranting its taking jurisdiction and denying the motion to dismiss the appeal (R. 121), the Circuit Court of Appeals apparently considered that this Court has established a general rule that a statutory requirement for allowance of an appeal may be disregarded, overlooking the exceptional circumstances of that case. There the Circuit Court of Appeals for the Second Circuit, where the case arose, had held in *London* v. *O'Dougherty*, 102 F. (2d) 524, that appeals from certain compensation orders in bankruptcy cases could be held as a matter of right. In reliance upon the permanency of that decision, the appellants filed notices of appeal from compensation orders without making application to the Circuit Court of Appeals for leave to appeal. Thereafter this Court, in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, held that appeals from such orders may be had at the discretion of the Circuit Court of Appeals. Misled by the decision of their own court in *London* v. *O'Dougherty*, the appellants were thus caught in a trap. This Court held that in view of the circumstances and the diligence of appellants in following the then established procedure, "it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London* v. *O'Dougherty*, supra" (p. 583). But this Court carefully pointed out that

> "The proper procedure for taking them (appeals) is by filing in the Circuit Court of Appeals, within the time prescribed in §25(a), applications for leave to appeal, not by filing notices of appeal in the District Court as was done here" (p. 581).

> "Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient" (p. 582).

Concurring, Mr. Justice Reed, Mr. Justice Roberts joining with him, stated:

> "Timely application to the circuit court of appeals for leave to appeal is a jurisdictional requirement, and • • • the practice followed in this case cannot be reduced to a mere procedural irregularity. • • • However, when petitioners filed their notices of appeal in the district court the proper procedure was not settled, and petitioners were misled by the decision of the court below in *London* v. *O'Dougherty*, 102 F. (2d) 524. In these unique circumstances I think that reversal of the judgment is justified by our broad power to make such disposition of the case as justice requires" (p. 583).

In the case at bar, no exceptional circumstances whatever were present, and respondent was not misled by any unsettled practice or conflict of authority. The decision of *Alaska Packers Association* v. *Pillsbury*, decided in 1936, stood as a clear and final pronouncement of the law that 28 U. S. C. §230 means what it says and that appeals in admiralty are invalid unless application is duly made to the Court for allowance of appeal within three months from the entry of the decree. The record is barren of any justification for failure to make such application to the District Judge who was available and whose nunc pro tunc order of August 30, 1943, shows he was not requested to allow an appeal (R. 113). The practice in the Second Circuit, where leading proctors for respondent principally practice (R. 112), is definitely established, not only by *Alaska Packers Association* v. *Pillsbury*, but by Rule XXXVIII of the Rules of the Circuit Court of Appeals for the Second Circuit which provides:

> "• • • An allowance of the appeal shall be obtained and filed with the notice."

The duty to apply for an allowance of appeal rests upon the appellant, not upon the Clerk of the Court. *Von Holt* v. *Carter*, C. C. A. 9, 56 F. (2d) 61; *Greyerbiehl* v. *Hughes Electric Co.*, C. C. A. 8, 294 Fed. 802, 804, cert. den. 264 U. S. 589; *Kentucky Coal Co.* v. *Howes*, C. C. A. 6, 153 Fed. 163; *Warner* v. *Texas & P. Ry. Co.*, C. C. A. 5, 54 Fed. 920.

It is respectfully submitted that in holding that respondent's acts in merely filing a notice of appeal and conferring with the District Judge concerning the amount of an appeal bond to be executed later, constituted due application for allowance of appeal, the Circuit Court of Appeals has construed 28 U. S. C. §230 contrary to its express terms and to established authority, and has in effect nullified it.

## POINT II

**In finding that petitioner breached its contract upon evidence of the weight of the timbers near interior points of origin regardless of the subsequent substantial loss of weight, the Circuit Court of Appeals erroneously held that the burden of proving the weight on shipment shifted from the proponent to the opponent thereof, contrary to established authority.**

In holding that "The evidence of the rail weights was sufficient, unless overthrown to entitle libellant to judgment" (R. 121), the Circuit Court of Appeals misapprehended the nature of the proofs offered by libellant, respondent herein. Its statement that "The positive rail weights (were) obtained and furnished by the respondent (R. 121) (petitioner herein)" shows that the Circuit Court of Appeals considered that petitioner had proffered to respondent the rail weights at interior points of origin as some sort of a representation of the weights at shipside. This assumption not only finds no support anywhere in the record, but is disproved by the uncontradicted evidence that three days before the *Kotor* arrived at Jacksonville,

the ship's agent informed petitioner's representative that the way bills on the cars showed them to be in excess of the 4 pounds per foot (R. 95). All that petitioner did was to have the suppliers load the timbers on the cars from their water storage at Century, Brewton and Gulf Hammock, pay the freight charges as weighed and assessed by the railroads, and have the timbers shipped to Jacksonville. The rail weights were in fact obtained by the railroads, and came into the hands of the ship's agent only because the timbers were shipped to petitioner in his care (Pl. Exs. 2 and 6). They were admitted in evidence at the trial only because petitioner, in response to a demand for admission of the genuineness of the railroad freight bills (R. 12), and that the net weights referred to therein represented the true weight *at the time and place described in said railroad freight bills* (R. 12, 13) stated:

> "Respondent admits that the net weights stated in said railroad freight bills were the weights of the respective shipments of lumber, as ascertained by the respective railroads for the purpose of determining a basis for assessing railroad freight charges, at the dates when and places where the said freight bills show the weights were ascertained.
>
> "Respondent does not admit but on the contrary denies, that the weights stated in said railroad freight bills show the weights of the said lumber when loaded on the S.S. *Kotor*." (R. 18)

The railroad weights near points of interior origin had no probative force except by indulging in an inference that the weight of the timbers was continuous in its nature while abundantly ventilated in open stowage on railroad flat cars during the interval of about two weeks when traveling about 400 miles and awaiting loading on the ship. Petitioner, by uncontradicted testimony, established that the weight of the timbers was composed of the weight of the wood and of water which had penetrated the timbers during their long immersion in water storage, and that water-stored timbers dry out and lose weight rapidly when ex-

posed to the circulation of air, as occurred during and after the railroad transit (R. 51, 52, 65, 71, 72, 77, 78, 83, 85). Indeed, the Circuit Court of Appeals, while criticizing the opinion evidence concerning the extent of evaporation and loss of weight prior to loading on the ship at Jacksonville, said:

> "This does not mean that the opinion testimony that the timbers would dry and had to some extent dried must be wholly rejected" (R. 121).

Thus respondent necessarily based its claim that the timbers were overweight when loaded on the vessel at Jacksonville upon an inference that the timbers had not undergone such a substantial loss of weight after they were weighed on the railroads as to result in a hypothetical weight of more than 4 pounds per foot when loaded on the ship. In holding that the burden rested upon petitioner to "entirely overthrow" the railroad weights, the Circuit Court of Appeals in effect held that the burden of proving the ultimate fact of weight shifted from respondent herein, the proponent thereof, to petitioner. The Circuit Court of Appeals thereby violated a fundamental canon of law that the burden of proving a breach of warranty rests upon the party asserting it, *Aetna Insurance Co.* v. *Taylor*, C. C. A. 5, 86 F. (2d) 225, and that the burden of proving an ultimate fact never shifts. *Gilmore* v. *United States*, C. C. A. 5, 93 F. (2d) 774, cert. den. 304 U. S. 569; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, C. C. A. 2, 114 F. (2d) 248, aff'd 314 U. S. 104.

It is elementary that a party suing for breach of warranty must prove (1) the warranty, (2) the breach, and (3) the damages. *Excelsior Coal Co.* v. *Gildersleeve*, C. C. A. 2, 160 Fed. 47. In the present case the Circuit Court of Appeals has held that the party against whom a breach of warranty is asserted, must prove that it has not committed a breach.

Where an ultimate fact is sought to be proved on the basis of an inference of the continuance of a known con-

dition, the proponent obviously must establish that the inference is logically correct. An inference of a continuous state may arise in respect of a material thing when its nature is continuous. But where the nature of the object is such as likely to undergo a substantial change, no inference can arise that the previous condition remains constant. As the District Judge well put it, "Blocks of ice and blocks of granite weighing the same when the sun shines on them hot do not last equally as long" (R. 21).

In *Jensen* v. *Logan City*, Utah, 1936, 57 Pac. (2d) 708, 717, the general rule is well stated as follows:

> "Where the situation has inherent in it the likelihood of a change of state or the circumstances are such as to present opportunities for either natural forces or the intervention of persons or animals to cause a change in the situation, the testimony of a state presumed to continue must be fairly near the time of the event it is presumed to continue to and the more volatile the situation the nearer to the event must the observation be in order to become probative."

In *Cleveland, C. C. & St. L. Ry. Co.* v. *Starks*, Indiana, 1914, 106 N. E. 646, 651, the Court said:

> "In the process of proof by inference, there must first be established a fact or collection of circumstantial facts, bearing some relation to the fact to be proven. The court determines, as matter of law, whether or not any such relation may probably exist, and the jury then ascertains the relation, if any, by recourse to inferences. If the existence of such relation does not rise above the realm of the merely conjectural or speculative into that of the reasonably probable, indulging in inferences is not permissible, since, from such a situation, no inference could be drawn."

*Wigmore on Evidence*, 3d Ed., Vol. 2, Sec. 437, states:

> "When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior exist-*

*ence* of it is in human experience some indication of its probable persistence or continuance *at a later period.*

"The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half an hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence today will vary according to the nature of the tree and the conditions of life in the region."

Accordingly, where the weight of articles is susceptible of undergoing a change between the time of shipment and the time of delivery, evidence of the weight at time of shipment is inadmissible to prove the weight at destination. *Cage* v. *Amsler*, Civ. App. Texas, 1919, 217 S. W. 1094, where the Court said:

"In these circumstances, the sole question being the weight at Houston, it was immaterial how many pounds were put in the car up at Howth, and evidence that any particular number of pounds were shipped from there would not tend to prove that the same quantity were delivered in Houston so many days later, especially in the absence of any showing that the shipment in the meantime remained intact. *Richard Cocke & Co.* v. *Big Muddy Coal & Iron Co.*, 155 S. W. 1019; *McLaughlin* v. *Terrell Bros.*, 179 S. W. 932."

To the same effect are *Hawkins* v. *Byrn*, Sup. Ct., Tenn., 1924, 261 S. W. 980; *Bludworth* v. *Bray*, 1910, 59 Fla. 437, 52 So. 957; *Lehigh Zinc & Iron Co., Ltd.* v. *Trotter*, 1887, 42 N. J. Eq. 661, 9 Atl. 694.

The only legal effect of a preliminary inference that the timbers retained their moisture content and that therefore

the previous rail weights remained continuous up to the time of loading on the vessel at Jacksonville, was to cast upon petitioner the duty of producing *some* evidence to the contrary. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43. Petitioner fulfilled that duty by evidence that the weight of the timbers was largely affected by the amount of moisture which had been absorbed in water storage but which substantially evaporated thereafter. Thus any preliminary inference that the weight of the timbers at Jacksonville was the same as the weight when ascertained by the railroads at interior points, vanished upon the introduction of this opposing evidence. *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 643. A "presumption" of fact, or inference, is not evidence, and ceases upon the introduction of substantial evidence to the contrary. *N. Y. Life Ins. Co.* v. *Gamer*, 303 U. S. 161; *Wigmore Evidence*, 3d Ed., Vol. 6, Sec. 2491.

If the weight of a quantity of ice delivered at a certain time and place were in issue, the party having the burden of proving such weight could manifestly not prevail upon proof of what the ice weighed when put into an open wagon the day before in hot summer weather. For no reasonable inference would arise that the weight of the ice remained constant, and it is inconceivable that a court would cast upon the opponent the burden of proving how much the ice melted in the meantime. Yet that is precisely the illogical principle which the Circuit Court of Appeals has established in the case at bar.

Moreover, the Circuit Court of Appeals failed to mention, and apparently completely overlooked, the fact that it was entirely unnecessary (except for respondent's own choice) to rely upon surmise and conjecture as to what the weight of petitioner's shipment amounted to when loaded on the vessel. Petitioner's representative was willing that the entire shipment should be weighed on the track scales at Jacksonville, but respondent's agent declined with the excuse that this would cause too much delay in loading the

ship, although the *Kotor* did not arrive at Jacksonville until three days and did not complete loading until eleven days later (R. 96, 97). As the District Court correctly held:

> "In the absence of any custom to govern the matter, the person who wants to ascertain the quantity must incur the trouble and expense of the weighing" (citing *Coulthurst* v. *Sweet* [1866], L. R. 1 C. P., 649, cited in Scrutton on Charter Parties, 14th Ed., p. 419) (R. 22).

Not only did respondent fail to obtain the best and easily available evidence by the simple and inexpensive method of having the timbers weighed on the cars at Jacksonville, but without excuse it failed even to call the ship's agent as a witness.

The opinion of the Circuit Court of Appeals fails to lay down any standard for the guidance of the District Court in further proceedings herein. Its statements that "the evidence of the rail weights was sufficient unless overthrown to entitle libellant to judgment" (R. 121), but that "the opinion testimony that the timbers would dry and had to some extent dried" need not be "wholly rejected" (R. 121), leave the basic question of the actual weight when loaded on the *Kotor* in the same realm of speculation and conjecture where, because of respondent's refusal to ascertain the facts by weighing the timbers at Jacksonville, it has remained throughout. Obviously, the burden of proving a material fact is not sustained by reliance upon surmise or conjecture, as the District Court correctly held (R. 27).

## POINT III

**The Circuit Court of Appeals misconstrued a contract for ocean shipment of cargo on the basis of measurement with a collateral warranty of weight, as being the same as a contract for shipment on the basis of weight. Not only has it cast upon the shipper the burden of disproving the carrier's assertion of overweight based upon an insupportable inference of the continuous nature of a previous condition, but it has held that a shipper who has paid full ocean freight is subjected to extra payment without proof of any damages resulting from breach of warranty, contrary to established principles of law.**

The Circuit Court of Appeals misapprehended the nature of the shipping contract, for its recital of the case shows that the Court considered the contract as requiring shipment by petitioner of timbers at $35 per ton ocean freight (R. 115, 116), whereas the contract itself clearly shows that it called for shipment of "750,000 boat feet pine timbers not exceeding 4 pounds per board foot at $70.00 per 1000 board feet" (R. 24, 39, 102).

Thus the Circuit Court of Appeals has in effect held that a contract for ocean carriage, to be shipped and paid for on a measurement basis, with a collateral warranty of weight, is the same as shipment on a weight basis. If this be true, then freight classifications and tariffs of carriers generally will be thrown into confusion, and the law of contract warranties will have to be substantially revised. For hitherto it has been well established that an undertaking that goods possess certain qualities amounts to no more than a warranty, *Albany & Rensselaer Co.* v. *Lundberg*, 121 U. S. 451; and that the party suing for breach of warranty not only has the burden of proving such breach, *Aetna Ins. Co.* v. *Taylor*, supra, but of proving the dam-

ages, *Excelsior Coal Co.* v. *Gildersleeve*, C. C. A. 2, 160 Fed. 47.

A court of admiralty will not enter even an interlocutory decree unless the libellant establishes his right to recover some damage. Mere nominal claims will not be entertained. *In re Cal. Nav. & Imp. Co.*, 110 Fed. 670, 677; *Munson* v. *Straits of Dover S.S. Co.*, 99 Fed. 787, 792, aff'd C. C. A. 2, 102 Fed. 926; *Herbst* v. *The Asiatic Prince*, 97 Fed. 343, aff'd C. C. A. 2, 108 Fed. 287, cert. den. 183 U. S. 697; *Barnet* v. *Luther*, 2 Fed. Cas. 1025.

Nevertheless, the Circuit Court of Appeals, without even mentioning this defense (which the District Court found unnecessary to consider because it dismissed the libel for respondent's failure to sustain the burden of proving excess weight when loaded on the ship) (R. 23), reversed the decree of the District Court and remanded it for "further and not inconsistent proceedings" (R. 121, 122). The record is barren of an iota of evidence that respondent "lost freights on a corresponding amount of tonnage" as its libel (R. 3) alleged, or even to establish a prima facie case showing any damages whatever. No proof was offered that respondent had other cargo available and was prevented from loading it by reason of the asserted diminution of the vessel's deadweight carrying capacity resulting from any alleged overweight of petitioner's shipment. On the contrary, the record shows that the *Kotor* loaded an additional quantity of about 55,000 feet shipped by petitioner under a second booking which was made without any guaranty that the weight would be less than 5 pounds per foot (R. 88, 89), such timbers being "green" (not water-stored) and all that petitioner could supply at short notice (R. 89, 92, 93, 96, 100). Moreover the *Kotor* loaded another shipment of timbers belonging to someone else (R. 97). The record contains no evidence that any other available cargo was shut out, or that respondent, who concededly was paid full freight at the contract rate of $70 per 1,000 board feet measurement (R. 26, 97) sustained any damages whatever.

It is respectfully submitted that the errors which the Circuit Court of Appeals committed in misconstruing the contract herein and the law applicable thereto, warrants review by this Honorable Court.

## LAST POINT

**The prayer of the petitioner should be granted.**

Your petitioner respectfully submits that the final determination by this Court of the questions of law involved in this case is of the utmost importance to the courts and practitioners of admiralty, in respect of the statutory requirements for appellate procedure, and to the rights of shippers and carriers and others engaged in commercial undertakings.

The decision of the Circuit Court of Appeals herein is not only contrary to the law, as interpreted by this and other courts in earlier decisions, but is contrary to sound principles of law both in respect of statutory construction and in respect of commercial law and the laws of evidence.

Unless the errors in that decision be corrected by this Court, the effect will be to nullify the statute governing appeals in admiralty, and to create regrettable confusion regarding questions of law which are of the utmost importance in contracts of affreightment.

Respectfully submitted,

JOHN TILNEY CARPENTER,
Counsel for Petitioner.